Supreme Court, U.S.
FILED
JUN 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1715

In the Supreme Court of the United States

OCTOBER TERM, 1987

HENRY H. HALE, PETITIONER

v.

ANN D. MCLAUGHLIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that the court of appeals erred in upholding the district court's decision granting summary judgment in a Title VII case.

1. Petitioner is an employee at the Occupational Safety and Health Administration (OSHA) of the Department of Labor (the Department). During the relevant period, he was a Program Area Leader at the OSHA Training Institute. Petitioner's function in that non-supervisory GS-13 position was to provide course direction for safety training programs (Pet. App. 177). While employed in that position, petitioner unsuccessfully sought promotion to six GS-14 managerial positions—five OSHA Area Directorships and a Safety Program Manager position (*id.* at 177-178).

Petitioner subsequently filed administrative complaints alleging that his nonselection for these promotions was based upon his race and therefore violated Title VII of the

Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 175, 179). An EEOC hearing examiner conducted a hearing on these claims and concluded that they lacked merit. The Department adopted the examiner's findings as the agency's final decision. Pet. App. 66-120, 179, 180.[1]

2. Petitioner then filed this Title VII action in federal district court, claiming that the Department's failure to promote him was based on race discrimination. Petitioner's complaint also included various Title VII claims of employment-related discrimination on behalf of a class of black professional workers employed by the Department (Pet. App. 307; see Pet. 12).

The Department filed a motion for summary judgment, asserting that there were no genuine issues of material fact. In support, it submitted extensive documentary evidence regarding the qualifications needed for the positions at issue and the qualifications of the persons ultimately selected (Pet. App. 185-198). The Department also sought dismissal of the class claims on the ground, inter alia, that petitioner was not an adequate representative of the class (Mot. Summ. Judgment 5-8). Although petitioner responded to the motion, he did not present any evidence or challenge any of the Department's evidence

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[1] Petitioner also filed an administrative complaint containing class allegations of racial discrimination (Pet. App. 179). A hearing examiner declined to accept petitioner's class complaint, and that decision was adopted by the Department (see Gov't C.A. Br. 3). Petitioner appealed the Department's rejection of the class complaint to the Office of Review and Appeals (ORA) of the Equal Employment Opportunity Commission. ORA rejected the appeal as untimely (Pet. App. 124, 309). The government sought dismissal of the class claims in this action based upon the untimeliness of petitioner's ORA appeal. The district court found it unnecessary to reach this issue, and the court of appeals noted that petitioner had exhausted his administrative remedies and that any untimeliness problem had been corrected (*id.* at 200, 309-310 n.2).

regarding his nonselection (Pet. App. 194, 199). Nor did petitioner seek a continuance in order to conduct discovery on his individual claims (*id.* at 310-311).

The district court, noting that "[s]ummary judgment in a Title VII discrimination case must be approached cautiously" (Pet. App. 182), granted summary judgment to the Secretary (*id.* at 175-200). It indicated that petitioner had not challenged the government's facts and had not produced any contradictory evidence (*id.* at 194, 199). With respect to the area directorship positions, the court ruled that petitioner had not established a prima facie case because the Secretary's undisputed evidence showed that, at the time of his application, petitioner did not possess the minimum qualifications for the job, *i.e.*, the technical ability to conduct complex investigations and the managerial capability to supervise a staff of safety and health professionals (*id.* at 185-189). The court also ruled that the Secretary had, in any event, rebutted any prima facie case by showing that the persons selected as area directors were better qualified than petitioner because they had substantial experience with technical investigations and as supervisors of a professional staff (*id.* at 190-195).

As to the Safety Manager position, the district court concluded that, although petitioner possessed the minimum qualifications for the position, the Secretary's undisputed evidence showed that the person selected was better qualified. That person, unlike petitioner, had successfully fulfilled complex OSHA management and supervisory roles (Pet. App. 197) and had valuable "specialized experience in monitoring contracts and analyzing statistical data" (*id.* at 198). The court concluded that, "[a]s with the Area Director positions," plaintiff did not "raise the argument that [the Secretary's] rationale [for the nonselection] is merely a pretext nor does a complete review of the evidence create an inference thereof" (*id.* at 199).

Thus, because there were no disputed issues of fact pertaining to the Secretary's nondiscriminatory reasons for failing to promote petitioner, the court granted summary judgment to the Secretary on the individual promotion claims (*id.* at 195, 199).

The court concluded that, in light of its summary judgment ruling on the individual claims, "no named representative [of the class] remains" and, consequently, the class claims should be "dismissed without prejudice to the purported class members" (Pet. App. 200).[2]

3. The court of appeals affirmed in an unpublished opinion (Pet. App. 305-311). It held that the "district court carefully evaluated [petitioner's] claim and properly granted the defendant's motion for summary judgment before certifying the class" (*id.* at 307). The court therefore adopted the district court's opinion as its own (*id.* at 309). It also added that the district court did not err in granting summary judgment without allowing petitioner additional time for discovery because petitioner did not request a continuance (*id.* at 310-311).

4. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

a. Petitioner claims (Pet. 13-28) that the court of appeals erroneously affirmed the district court's order granting summary judgment to the Department on his individual claims of discrimination. That claim lacks merit.

In response to the Secretary's motion for summary judgment, petitioner did not question the government's facts

[2] The district court indicated (Pet. App. 181-182) that it was appropriate to consider the motion for summary judgment prior to class certification, since the resolution of a motion relating to the merits of plaintiff's individual claims would not prejudice potential class members.

showing that the individuals hired for the positions at issue were more qualified (Pet. App. 194, 199). Nor did he offer any evidence of his own to contradict the government's evidence (*ibid.*). Furthermore, petitioner made no claim that the Department's reasons for his non-promotion were pretextual (*ibid.*). Under these circumstances, since petitioner bore the burden of proving that the Department's actions were motivated by race (*e.g., Texas Dep't of Community Affairs* v. *Burdine,* 450 U.S. 248, 256 (1981)), the grant of summary judgment to the Secretary was entirely proper. See, *e.g., Celotex Corp.* v. *Catrett,* 477 U.S. 317, 322 (1986) (noting that Rule 56(c) requires the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"); *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986) (stating that a party opposing summary judgment "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial"); see also *Box* v. *A & P Tea Co.,* 772 F.2d 1372, 1378 (7th Cir. 1985) (court may grant summary judgment to Title VII defendant if, "viewed in the light most favorable to the plaintiff, the evidence fails to demonstrate a genuine issue of material fact as to pretext"), cert. denied, 478 U.S. 1010 (1986).[3]

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[3] Petitioner errs in contending (Pet. 39-54) that the courts below denied him a trial de novo in contravention of *Chandler* v. *Roudebush,* 425 U.S. 840 (1976). The district court's grant of summary judgment does not indicate that the court failed to grant de novo review, but only that the court was able to resolve the case as a matter of law because of the absence of disputed facts (Pet. App. 180). Moreover, contrary to petitioner's suggestion (Pet. 39-40), the courts below did not accord preclusive effect to the findings of the hearing examiner that petitioner was not the victim of discrimination. The district court

Petitioner also argues (Pet. 51-54) that he was improperly denied the opportunity to conduct discovery and that the grant of summary judgment was therefore premature. That argument was properly rejected by the court of appeals, since petitioner did not seek a continuance pursuant to Fed. R. Civ. P. 56(f) or indicate in his opposition to summary judgment that further discovery was needed on his individual claims (Pet. App. 310-311; see *id.* at 130-155).[4]

b. There is likewise no merit to petitioner's claim (Pet. 54-62) that the court of appeals erred in approving the dismissal of his class claims. The district court's dismissal was "without prejudice to the purported class members" (Pet. App. 200). The reason for the dismissal was that petitioner was unable to withstand the summary judgment motion on his individual claims and thus was not a member of the class of alleged victims of discrimination whom he sought to represent (*id.* at 182, 200). Contrary to petitioner's contention (Pet. 54-60), this ruling is correct because, as the courts below held, a plaintiff who is not a member of the class he seeks to represent cannot

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merely stated that the administrative findings need not be ignored (Pet. App. 180 n.2), a view entirely consistent with the Title VII right to de novo federal court review. See *Chandler*, 425 U.S. at 863 n.39 ("Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*.").

[4] In his petition (at 45-46), petitioner names one potential witness who allegedly would have testified regarding racist comments made by a member of the panel that denied petitioner certification status for an area directorship position. Petitioner, however, did not submit an affidavit from this potential witness in his opposition to the summary judgment motion and did not request a continuance in order to procure one.

qualify as a representative of that class. See, *e.g.*, *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 403-404 (1977); *Trevino* v. *Holly Sugar Corp.*, 811 F.2d 896, 906 (5th Cir. 1987); *Everitt* v. *City of Marshall*, 703 F.2d 207, 210 (5th Cir.), cert. denied, 464 U.S. 894 (1983). Thus, where it is clear prior to certification and trial that the named plaintiff is not a victim of the discrimination that he alleges on behalf of the class, it is appropriate to dismiss the class claims. See, *e.g.*, *East Texas Motor Freight System, Inc.*, 431 U.S. at 406 & n.12. While a named plaintiff is not necessarily required to establish that he or she is indeed the victim of discrimination before representing a class in an employment discrimination action (*Trevino*, 811 F.2d at 906 n.17), it is proper for a court to consider undisputed evidence offered in support of a summary judgment motion that the purported class representative is not a member of the class of alleged victims of discrimination. See, *e.g.*, *Gray* v. *Frito-Lay, Inc.*, 35 Fair Empl. Prac. Cas. (BNA) 598 (S.D. Miss. 1982). Since petitioner could not even survive a motion for summary judgment with respect to his own claims, it is apparent that he could not have provided adequate representation of the interests of the class. See generally *East Texas Motor Freight System, Inc.*, 431 U.S. at 403-404.

Petitioner also contends (Pet. 54-60) that the district court improperly considered the "merits" of his claims before making a class certification decision. In support of that claim, he relies upon language in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974), that a court should not issue a "determination on the merits of the claims advanced on behalf of the class" before deciding whether a suit may be maintained as a Rule 23 class action. Those statements, however, are inapposite because the district court here did not decide the merits of the class claims, but simply dismissed them without prejudice

because there was no proper class representative before the court. And the district court resolved the merits of petitioner's *individual* claims at an early stage in the litigation and before a class certification decision solely because petitioner was unable to withstand the Department's summary judgment motion. Thus, the court's rulings were entirely proper.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1988

[5] Petitioner also seeks review on the question whether the district court improperly "fail[ed] to resolve the untimeliness issue" raised by the Secretary (*i.e.*, the failure to exhaust administrative remedies) with respect to petitioner's class claims (Pet. i; see also *id.* at 28-39). However, that issue does not warrant review; although the court of appeals ruled against petitioner on the merits, it agreed with his claim that he had exhausted his administrative remedies (Pet. App. 309-310 n.2).

U.S. GOVERNMENT PRINTING OFFICE: 1988—202 037/60485